122 — 469

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 311.

SAMUEL CLINTON, PLAINTIFF IN ERROR,

vs

THE MISSOURI PACIFIC RAILWAY COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED SEPTEMBER 25, 1884.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 Pleas before the Honorable Elmer S. Dundy, judge of the district court of the United States for the district of Nebraska, within the eighth judicial circuit, sitting in the circuit court of the United States for said district of Nebraska, at the term of January, 1884.

Be it remembered that on the 17th day of October, 1882, a transcript was filed in the office of the clerk of said circuit court; which said transcript is in words and figures following, to wit:

STATE OF NEBRASKA, } ss:
Cass County, }

Pleas before the district court of Nebraska, at a term begun and holden in the county of Cass on the 20th day of June, A. D. 1882, before Hon. S. B. Pound, judge of the 2nd judicial district of the State of Nebraska.

SAMUEL CLINTON, Plaintiff and Appellant,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY OF NEBRASKA, Defendant and Appellee.

Be it remembered that heretofore, to wit, on the 28th day of January, A. D. 1882, an appeal was filed in the office of the clerk of the district court in and for the county of Cass in the words and figures fellowing, to wit:

Application of the Missouri Pacific Railway Company of Nebraska for Commissioners to Appraise and Assess Damages Accruing to the Owners of Land Appropriated by said Railway Company.

In the County Court of Cass County, Nebraska.

2 July 5th, 1881.—Be it remembered that on this day *that* the Missouri Pacific Railway Company of Nebraska, by its attorney, Frank P. Ireland, filed petition praying for the appointment of commissioners to appraise and assess the damages accruing to the owners of land which said railway company desires to appropriate for the purpose of constructing and operating its road, together with necessary stations, buildiings, workshops, depots, machine-shops, switches, side tracks, turn-tables, water stations, aqueducts to conduct water, and drains for the drainage of said road and its appurtenances; and also necessary excavations, embankments, and places for depositing waste earth from the northern terminus, in Douglas county, Nebraska, in and through Sarpy, Cass, Otoe, Nemaha, and Richardson to the State line or Nebraska.

Upon reading and filing said petition the following-named resident freeholders were appointed as such commissioners, to wit: Joseph W. Johnson, Lawson Sheldon, Joseph H. McKinnon, Joseph M. Beardsley, George W. Adams, and Benj. G. Hoover.

Sept. 27, 1882.—Summons issued for said commissioners on precipe of petitioner and commissioners summoned to meet at Louis-

ville, in said county of Cass, at 11 o'clock a. m., on the 12th day of September, A. D. 1881.

Sept. 12, 1881.—Summons returned duly served (return not here copied).

Joseph H. McKinnon and Jos. M. Beardsley as aforesaid failing to appear, summons issued for Samuel Rector and C. F. Came, and thereupon the following persons, resident freeholders of said county, appeared and took the oath prescribed by law as such commissioners: Joseph W. Johnson, Lawson Sheldon, Samuel Rector, C. F. Came, and Benj. G. Hoover, and George W. Adams.

December 1st, A. D. 1881.—The following award was re-
3 turned, notice to owner given by publication, to wit:

STATE OF NEBRASKA, } ss:
Cass County, }

To the county court of Cass county, State of Nebraska, and to the judge of said court:

We, the undersigned, residents and freeholders of Cass county, Nebraska, heretofore duly selected by said judge, and being summoned by the sheriff of said county and duly qualified to inspect the real estate in said county over and through which the Missouri Pacific Railway Company of Nebraska, a corporation in said State, desire to locate a railroad, and to assess the damage which the respective owners of real estate may sustain and all persons having any interest or claim whatever in said real estate by reason of the appropriation of their land, respectively, for that purpose in said county, respectfully report to your honor, the judge of the said county court, to wit:

Pursuant to notice, on the twenty-third day of November, 1881, we personally, in body, actually viewed and inspected the following real estate, through and over which land said railroad company has located its railroad bed: A strip of land embraced within fifty feet on either side of the center line of the road of said company through, over, and across that tract or parcel of land known as the "Mill Reserve," situated in the town of Weeping Water, county of Cass, State of Nebraska, excepting, however, within said fifty feet so appropriated by said Missouri Pacific Railway Company of Nebraska, the mill-house proper, the mill dam or race, and its privileges, to the exclusive use and benefit of the owner or owners of said property, and we do assess the damages sustained by the owners and parties claiming an interest in and to said land at $850.00, by reason of the appropriation of said land to the use of said railroad corporation as now located and described.

(Signed)
4

J. W. JOHNSON,
B. G. HOOVER,
C. F. CAME,
GEO. W. ADAMS,
LAWSON SHELDON,
S. RECTOR,
Commissioners.

January 28th, A. D. 1882.—Samuel Clinton filed notice of appeal from the foregoing award; said notice hereto attached and made a part of this transcript.

STATE OF NEBRASKA, } ss:
Cass County, }

I, A. A. Laverty, county judge within and for said county, do hereby certify that the above and foregoing is a true, correct, and literal transcript from the condemnation record of the Mo. Pac. R'y Co. of Nebraska, award No. 63, as the same appears of record this 28th day of January, A. D. 1882.

In testimony whereof I have hereunto set my hand and seal of the county court the day and year last above written.

[SEAL.] A. A. LAVERTY,
County Judge.

Endorsed: Filed Jan. 28, 1882. W. C. Showalter, clerk. Fees—$2.00—paid by appellant.

Notice of Appeal.

In the District Court of Cass County, Nebraska.

SAMUEL CLINTON, Appellant
vs.
MISSOURI PACIFIC RAILWAY COMPANY OF NEBRASKA, Appellee.

To the Missouri Pacific Railway Company of Nebraska, appellee:

You are hereby notified that Samuel Clinton, appellant above named, has appealed to the district court of said county from the decision and award of damages to said appellant made and signed by the commissioners appointed—summoned on the 27th day of August, A. D. 1881, by Hon. A. N. Sullivan, county judge of said county—to appraise and assess the damages sustained by said appellant by reason of the appropriation and condemnation by said Missouri Pacific Railway Company of Nebraska of a strip of land for right of way, side track, and switch purposes, situated in the county and State aforesaid and described as follows, to wit: That certain strip of land embraced within fifty feet on either side of the center line of the road of said company through, over, and across that tract or parcel of land known as the "Mill Reserve," situated in the town of Weeping Water, in the county aforesaid, excepting, however, within said fifty feet so appropriated by said Missouri Pacific Railway Company of Nebraska, the mill-house proper, the mill dam or race, and its privileges, to the exclusive use and benefit of the owner or owners of said property, and which said decision and award of damages was so made, signed, and delivered by said commissioners on the first day of December, A. D. 1881, by which decision said appellant was awarded the sum of $850.00.

And you are further notified that on the first day of the next regular term of said district court, at the court-house in said county,

or as soon thereafter as said appellant can be heard, the said appellant will bring said cause to a trial and a hearing therein, when and where you may appear and be heard. The appellant claims damages by reason of such appropriation and condemnation in the sum of fifteen thousand dollars.

Dated this 27th day of January, 1882.

SAMUEL CLINTON,
Appellant, in Person.

Return Service.

STATE OF NEBRASKA, } *ss:*
Douglas County, }

6 I, John W. Morse, do solemnly swear that I am twenty-one years of age and upwards; that I received the annexed notice of appeal on the 27th day of January, A. D. 1882, and that on the 28th day of January, 1882, in the city of Omaha, in the county aforesaid, I served the same upon the Missouri Pacific Railway Company of Nebraska (appellee herein) by leaving a true and certified copy of the same at the office of I. E. House, the chief engineer of the Missouri Pacific Railway Company of Nebraska, it being his usual place of doing the business of said company, said copy being left with William L. Adams, an inmate and employee at said office in the business of said railway company, and the said William L. Adams is over the age of twenty-one years, the said I. E. House not being found in the county.

J. W. MORSE.

Subscribed in my presence and sworn to before me this 28th day of January, 1882.

[SEAL.] ALBERT SWARTZLANDER,
Notary Public, Douglas County, Neb.

Endorsed: District court, Cass Co., Neb. Samuel Clinton, appellant, *vs.* The Missouri Pacific Railway Company of Nebraska, appellee. Notice of appeal. Filed January 28th, A. D. 1882. A. A. Laverty, county judge. S. Clinton, appellant, in person.

Know all men by these presents that Samuel Clinton, as principal, and C. H. Parmele, as surety, are held and firmly bound unto the Missouri Pacific Railway Company of Nebraska in the penal sum of five hundred dollars, for the payment whereof we hereby bind ourselves, our heirs, assigns, and representatives, by these presents.

The conditions of the above obligation are that the said Samuel Clinton having petitioned the district court of Cass county,
7 Nebraska, for the removal of a certain cause therein pending, wherein Samuel Clinton is plaintiff and the Missouri Pacific Railway Company of Nebraska is defendant, to the circuit court of the United States for Nebraska:

Now, if the said Samuel Clinton shall enter in the circuit court of the United States for said district of Nebraska, on the first day of

the next session thereof, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court if said circuit court shall hold that said cause was improperly removed thereto, then this obligation to be void; otherwise in force.

Witness our hands this 8th day of May, A. D. 1882.

SAMUEL CLINTON, *Principal.*
C. H. PARMELEE, *Surety.*

Bond and sureties approved by me this 20th day of June, A. D. 1882.

W. C. SHOWALTER, *Clerk.*

Endorsed: S. Clinton *vs.* The Mo. Pacific Railroad Co. Bond for removal. Filed June 20th, 1882. W. C. Showalter, clerk. Sullivan & Worley, for pl'ff.

Petition for Change of Forum.

In the District Court of Cass County, State of Nebraska. May Term, 1882.

SAMUEL CLINTON, Plaintiff & Appellant,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY OF NEBRASKA, Defendant & Appellee.

The petition of Samuel Clinton, plaintiff above named, respectfully represents to this honorable court that your petitioner, at the time of the commencement of this suit, was and still is a citizen of the State of Iowa, and that the defendant, The Missouri Pacific Railway Company of Nebraska, is a corporation duly organized under and by virtue of the laws of the State of Nebraska and is a citizen of said State of Nebraska; that the matter in dispute in this action, exclusive of costs, exceeds the sum of five hundred dollars.

Your petitioner makes and files herewith a bond, with good and sufficient sureties, for his entering into the circuit court of the United States for the district of Nebraska, on the first day of its next session, a copy of the record of this suit, and for paying all costs that may be awarded by the said circuit court, if said circuit court shall hold that this suit has been wrongfully and improperly removed thereto.

Your petitioner therefore prays an order for the transfer of said cause to said circuit court.

SULLIVAN & WOOLEY,
Attorneys for Petitioner.

UNITED STATES OF AMERICA, } ss:
District of Iowa, }

Samuel Clinton, being duly sworn, deposes and says that he is the petitioner named in the above petition, and that he has heard the same read and knows the contents thereof, and the same is true as he verily believes.

SAMUEL CLINTON.

Subscribed in my presence by Samuel Clinton, and sworn to before me this 8th day of May, 1882, by the said Samuel Clinton.

GEORGE F. WRIGHT,
U. S. Commissioner, District of Iowa.

Endorsed: S. Clinton *vs.* The Mo. Pacific Railway Co. Petition for removal. Filed June 20th, 1882. W. C. Showalter, clerk. Sullivan & Wooley, att'ys for pl'ff.

Affidavit Showing the Amount in Controversy.

UNITED STATES OF AMERICA, } ss:
District of Iowa, }

In the District Court of Cass County, Nebraska.

SAMUEL CLINTON
vs.
9 MISSOURI PACIFIC RAILWAY COMPANY OF NEBRASKA.

I, Samuel Clinton, plaintiff in the above cause, being first duly sworn, upon oath say that the above cause arises in the matter of the consideration of the right of way for the defendant's railroad bed through certain mill property owned by the plaintiff; that the amount awarded to the plaintiff by the commissioners appointed to assess the damages is eight hundred and fifty dollars, as shown by the papers in the cause, from which amount the plaintiff has taken his appeal, and he now says that his actual damage sustained thereby, and which he believes he can recover herein, exceeds the sum of five thousand dollars; and further saith not.

SAMUEL CLINTON.

Subscribed in my presence and sworn to before me by Samuel Clinton this 8th day of May, 1882.

GEORGE F. WRIGHT,
U. S. Commissioner, District of Iowa.

Endorsed: S. Clinton *vs.* The Missouri Pacific Railway Co. Affidavit showing the amount in controversy. Filed June 20th, 1882. W. C. Showalter, clerk. Sullivan & Wooley, for pl'ff.

Be it remembered that at the May adjourned term of the district court of the 2nd judicial district within and for Cass county, Nebraska, begun and holden in Fitzgrold's Hall, in the city of Plattsmouth, in Cass county, Neb. (said hall having been leased by the county commissioners of Cass county, Neb., for the purpose of holding therein the terms of the district court of Cass county), said adjourned term of said court beginning on the 20th day of
10 June, A. D. 1882—there being present Hon. S. B. Pound, judge; John C. Watson, district attorney; Reuben W. Hyers, sheriff; Oscar A. Mullen, official reporter, and W. C. Showalter, clerk—and court being opened in due form, the following, among others, was had and done, to wit:

Order of Removal of Cause.

SAMUEL CLINTON, Plaintiff and Appellant,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY IN NEB., Defendant and Appellee.

June 20, 1882.—Now, on this day, this cause came on to be heard upon the motion of the said plaintiff to remove this cause into the circuit court of the United States for the district of Nebraska; and, it appearing to the court that the petition and bond for the removal thereof are in due form and that said cause is one properly removable under the statutes of the United States, it is, therefore, considered and ordered by the court that the bond in said action be approved, and that said cause be removed into the circuit court of the United States for the district of Nebraska, and that no further steps be taken in this action in this said court.

STATE OF NEBRASKA, } *ss:*
Cass County, }

I, W. C. Showalter, clerk of the district court within and for said county, do hereby certify that the above and foregoing is a full and complete transcript of the pleadings and proceedings in the above-mentioned cause, including the final order of the court removing said cause into circuit court of the United States for the district of Nebraska.

In witness whereof I hereunto set my hand and official seal this 5th day of July, A. D. 1882.

[SEAL.] W. C. SHOWALTER,
Clerk of the Dist. Court, Cass County, Neb.

11 *Cost Bill.*

SAMUEL CLINTON

vs.

MISSOURI PACIFIC RAILWAY CO. OF NEBR.

Jan. 28th, 1882.		Cause docketed	75
"	"	Transcript filed	10
"	"	General index	10
"	"	Appearance doc. index	10
"	"	Calendar	15
June 20th, 1882.		Affidavit showing am't in controversy filed	10
"	"	Affidavit to same	25
"	"	Petition for removal filed	10
"	"	Bond for removal filed	10
"	"	Approval of bond	25
"	"	Order for removal of cause	50
"	"	Index of journal	10
"	"	Taxing costs	33
"	"	Transcribing order for removal on app. doc.	20
"	"	Transcript for U. S. circuit court	2 50
		Total amount of costs in district court	5 63

Received payment of the above costs in full from pl'ff, per Sullivan & Wooley.

W. C. SHOWALTER, *Clerk.*

12 Upon the back of said transcript appear endorsements in words and figures following, to wit: No. 340, G. Samuel Clinton, plaintiff, *vs.* The Missouri Pacific R. Co. in Nebr., defendant. Transcript. Filed Oct. 17, 1882. Elmer D. Frank, clerk, by A. L. Frank, deputy.

Thereupon afterwards, to wit, on the 17th day of December, 1883, a motion to remand was filed in said case; which said motion to remand is in words and figures following, to wit:

Motion to Remand.

In the Circuit Court of the United States for the District of Nebraska.

SAMUEL CLINTON, Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY CO. OF NEBRASKA, Defendant.

And now comes the Mo. Pacific R'y Co. of Nebraska, the above-named defendant, and appearing especially herein and for the purpose of this motion only, and moves the court here for an order remanding the above-entitled cause to the district court of the second judicial district of the State of Nebraska within and for Cass county, State of Nebraska, for the following among other reasons:

1st. That the pretended petition and application for the removal of this cause to this court made and filed by said plaintiff on or about June the 10th, 1882, in the said district court of Cass county, Nebraska, is wholly insufficient, irregular, and void, and sets forth no grounds or cause for the removal of this action from said district court of said Cass county.

2nd. Because and for the reason that this circuit court of
13 the United States for the district of Nebraska has no jurisdiction and has never acquired any jurisdiction in said above-entitled cause, either of the parties thereto or the subject-matter thereof.

3rd. Because it does not appear by the said petition for the removal of this cause from said district court of said Cass county that the said plaintiff and defendant were, at the time of the commencement of this suit, citizens of different States.

4th. Because it does not appear from the record of this cause on file in this court that this case comes within the provisions of the statutes of the United States authorizing any removal of said cause from said State court, to wit, the said district court of said Cass county.

5th. Because it nowhere appears in said record that the said defendant was a citizen of the State of Nebraska or a citizen of a different State from that of the said plaintiff at the time of the commencement of said above-entitled action.

6th. Because the said district court of said Cass county had no legal right, power, or authority to order a removal of this cause from said State district court of said Cass county to the circuit court of the United States for the district of Nebraska.

7th. Because the said district court of said Cass county alone has jurisdiction of this said case, the subject-matter thereof, and the parties thereto.

8th. Because the said district court of the said Cass county has never lost jurisdiction of this cause, the subject-matter thereof, or the parties thereto, and because this the said circuit court of the United States for the district of Nebraska has never acquired the jurisdiction of this cause, the subject-matter thereof, or the parties thereto.

14 And this defendant therefore objects to the jurisdiction of this court in and to said cause, and also objects and protests to any further proceedings of this court upon or in said cause or the trial thereof in this court, and respectfully asks and requests this court to remand said cause to said State district court of said Cass county, State of Nebraska, in accordance with law and the rules and practice of this court.

CHARLES OGDEN,
EVEREST & WAGGENER,
Attorneys for Defendant, Appearing Specially in This Court for the Purposes of This Motion Only.

Upon the back of said motion to remand appear endorsements in words and figures following, to wit: No. 340, G. In the circuit court of the United States for the district of Nebraska. Samuel Clinton, plaintiff, *vs.* The Mo. Pac. R'y Co., defendant. Motion to remand. Filed Dec. 17, 1883. Elmer D. Frank, clerk.

Thereupon afterwards, to wit, on the 18th day of December, 1883, motion to dismiss appeal was filed in said case; which said motion to dismiss appeal is in words and figures following, to wit:

Motion to Dismiss Appeal & Case.

In the Circuit Court of the United States for the District of Nebraska.

SAMUEL CLINTON, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY OF NEBRASKA, Defendant.

Now comes the Missouri Pacific Railway Company of Nebraska, and appearing herein specially for the purposes of this motion only, and here moves the court to dismiss the pretended appeal in
15 the above-entitled action and dismiss said cause, with costs, in favor of said defendant, for the following, among other, reasons:

1st. Because it does not appear from the transcript filed in this court that the county court of said Cass county, Nebraska, ever had

any jurisdiction, power, or authority to appoint or select commissioners to assess the damages to the premises claimed by the plaintiff.

2nd. Because it appears from the transcript in said cause filed in this court that the said commissioners, who were selected or appointed to assess the damages to the said lands claimed by said plaintiff, made such assessment of damage on the 23 of November, 1881, and the pretended appeal of said plaintiff from said assessment was not taken until the 28th day of January, 1882, being more than 60 days after such assessment.

3rd. Because it does not appear that any application was ever made, signed, and filed by the said defendant with the probate judge of the said Cass county, Nebraska, for the appointment of the said commissioners, who pretended to have made such assessment of damages to the lands claimed by plaintiff.

4th. Because it does not appear that any application was ever made, signed, and filed by the said defendant with the county judge of the said Cass county, Nebraska, for the appointment of said commissioners, who pretend to have made such assessment of damages to the lands claimed by plaintiff.

5th. Because the said transcript does not contain any application ever made by defendant to the probate court of the said Cass county, Nebraska, for the selection or appointment of said commissioners, who pretend to have assessed the damage to the said lands claimed by plaintiff.

16 6th. Because said transcript does not contain any application ever made by defendant to the county court, or county judge, or probate judge of said Cass county, Nebraska, for the appointment of said commissioners, who pretend to have assessed the damage to the said lands claimed by plaintiff.

7th. Because it appears from the transcript that the pretended notice of appeal given by said plaintiff is from the decision and award of damages to the lands of said plaintiff, which was made and signed by said commissioners appointed and summoned on the 27 day of August, 1881, but the transcript does not show that any commissioners whatever were ever selected or appointed by either the probate judge or county judge of said Cass county to make any appraisement or assessment of damages on the day or date mentioned and set forth in said pretended notice of appeal.

8th. Because it does not appear that said pretended notice of appeal was ever made or served upon the defendant, or upon the president — chairman of the board of directors, or other chief officer of defendant, or upon the cashier, treasurer, secretary, clerk, or managing agent of the defendant, or that any copy of said pretended notice of appeal was ever left at the office or last usual place of business of said defendant.

9th. Because it appears from said transcript that the county court of said Cass county, Nebraska, appointed commissioners to appraise and assess the damage accruing to the owners of land which said railway company desired to have appropriated for right of way in and through the counties of Sarpy, Cass, Otoe, Nemaha, and Rich-

ardson, in the said State of Nebraska, when said county court had no legal right, power, or authority so to do.

10th. Because it does not appear that any proper or legal
17 appeal was ever taken in this cause by the said plaintiff giving to the district court of said Cass county, Nebraska, jurisdiction, or giving to this the circuit court of the United States for the district of Nebraska any jurisdiction of this cause.

11. Because the transcript herein does not show that the county judge or probate judge of said Cass county, Nebraska, ever directed the sheriff of said Cass county, Nebraska, to summon any freeholders of said county to make the pretended assessment of damages to the lands claimed by plaintiff.

12th. Because it does not appear from the transcript herein that the county court, or county judge, or probate judge of said Cass county, Nebraska, ever selected any freeholders of said Cass county to make any assessment of damages to the lands claimed by plaintiff.

CHARLES OGDEN,
EVEREST & WAGGENER,
Attorneys for the said Defendant, Appearing Herein Specially for the Purposes of This Motion Only.

Upon the back of said motion to dismiss appeal appear endorsements in words and figures following, to wit: No. 340, G. In the circuit court of the United States for the district of Nebraska. Samuel Clinton *vs.* The Mo. Pac. R'y Co. of Neb. Motion to dismiss appeal, etc. Filed Dec. 18, 1883. Elmer D. Frank, clerk.

Thereupon, afterwards, at the November term of said court, on the 20th day of December, 1883, the following proceedings were had, as appears of record on folio 70, Journal "I," of said court, to wit:

SAMUEL CLINTON
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY IN NEBRASKA. } No. 340, G.

18 This cause coming on to be heard this 20th day of December, 1883, on the motion filed by the defendant to dismiss the appeal herein from the assessment of damages made by the commissioners appointed by the county court of Cass county, Nebraska, on the ground that said appeal was not taken within 60 days after the assessment of damages to said real estate by said commissioners, and for other reasons contained in said motion on file, and on argument of counsel and on consideration thereof by the court, the court doth here find that said appeal was not taken within 60 days from the date of the assessment of damage made by such commissioners of the land in controversy, and the court doth sustain said motion to dismiss such appeal.

It is now ordered by the court here that said appeal be, and the same is hereby, dismissed, each party to pay its own costs.

Thereupon, afterwards, to wit, on the 2nd day of January, 1884, motion for a rehearing was filed in said case; which said motion for a rehearing is in words and figures following, to wit:

Motion for a Rehearing.

SAMUEL CLINTON, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Now comes the plaintiff above named, and, by leave of court first had, moves the court to vacate the order herein sustaining the motion of the above-named defendant to dismiss this case and the appeal herein, and moves the court to rehear said motion and consider the same *de novo*, and files herewith and in support hereof a full and complete transcript of the proceedings had in condemnation herein.

19 The reasons for making this motion are that said motion should have been overruled and not sustained.

JOHN M. THURSTON,
Attorney for Plaintiff.

In County — of Cass County, Nebraska, July 5th, A. D. 1881.

Be it remembered that on this day that the Missouri Pacific Railway Company of Nebraska, by its attorney, Frank P. Ireland, filed petition, of which the following is a true copy:

STATE OF NEBRASKA, *County of Cass:*

In the County Court of Cass County, State of Nebraska.

In the Matter of the Application of the MISSOURI PACIFIC RAILWAY COMPANY OF NEBRASKA for the appointment of commissioners to assess damages.

To the Honorable Albert N. Sullivan, judge of the county court within and for Cass county, State of Nebraska:

Your petitioner, The Missouri Pacific Railway Company of Nebraska, respectfully represents to your honors that the said petitioner is a corporation organized under the laws of the State of Nebraska, and is about to locate and construct and operate a railroad, together with necessary stations, buildings, workshops, depots, machine-shops, switches, side tracks, turn-tables, water stations, aqueducts to conduct water and drains for the draining of said road and its appurtenances; and also necessary excavations, embankments, and places for depositing waste earth from the northern terminus in Douglas county, Nebraska, in and through Sarpy, Cass, Otoe, Nemaha, and Richardson — to the State line of Nebraska, its southern terminus; and your petitioner further

20 represents that some of the owners of the real estate along said line of said road so to be located and constructed as aforesaid, have refused to grant to the petitioner, although often

thereunto requested and although a sufficient and reasonable compensation has been offered to them therefor, sufficient real estate for the location and construction and convenience of said railroad, including necessary grounds for stations, buildings, machine-shops, switches, side tracks, turn-tables, and water stations, and a right of way over adjacent lands sufficient for the construction and repair of said road and its said appurtenances, and a right to conduct water by aqueducts, and the right of maintaining proper drains. Your petitioner therefore asks your honor to select six freeholders of said county of Cass and direct the sheriff to summon the same, and your honors authorize, empower, and command the said six freeholders, as selected and summoned, to be commissioners, whose duty it shall be to inspect all said real estate in said county of Cass and to assess the damages which the respective owners thereof will sustain by the appropriation of said real estate by this petitioner for the uses and purposes aforesaid, to wit, the location, construction, and operation of said railroad and all its said appurtenances, upon due and sufficient and legal notice being given to said owners by the petitioner, and to make report in writing of all their doings and proceedings in this behalf to the honorable judge aforesaid; and that said judge certify said report under the seal of his office, and transmit the same to the county clerk of said Cass county for record, and that said judge shall select and summon other freeholders to complete the panel of commissioners in case of the death, absence, or refusal or neglect of any of said freeholders to act as commissioners aforesaid; and your petitioner will ever pray.

21 THE MISSOURI PACIFIC RAILWAY COMPANY OF NEBRASKA,
By FRANK P. IRELAND, *Attorney.*

Thereupon and upon reading and filing the foregoing petition I appoint the following-named residents and freeholders of the county of Cass and State of Nebraska, to wit, Joseph W. Johnson, Lawson Sheldon, George W. Adams, Joseph M. Beardsley, Joseph H. McKinnon, and Benjamin G. Hoover, to act as commissioners, according to the prayer of said petition.

August 27th, 1881.—Summons issued on precipe of petitioner and commissioners summoned to meet at Louisville, in the said county of Cass. The following is a true copy of said summons, to wit:

STATE OF NEBRASKA, *Cass County:*

To the sheriff of said county, Greeting:

You are hereby commanded to notify Joseph W. Johnson, Lawson Sheldon, George W. Adams, Joseph M. Beardsley, Joseph H. McKinnon, and Benjamin G. Hoover that they have been appointed by the undersigned, county judge of said county, commissioners to appraise the damages accruing to owners of land by reason of the appropriation thereof by the Missouri Pacific Railroad Company of

Nebraska for the necessary purposes of said railroad in said county, and that the undersigned will meet said commissioners at Louisville, in said county, at 11 o'clock a. m., on the 12th day of September, A. D. 1881, to administer to them the oaths of their said office.

And of this writ you will make due service and return.

Witness my hand and the seal of the county court, at Plattsmouth, on this 27th day of August, 1881.

[SEAL.] A. N. SULLIVAN,
County Judge.

Which said summons was by me delivered to R. W. Hyers, sheriff, on the day of its issuance,

22 September 12th, 1881.—Summons returned endorsed as follows: I received this writ on the 27th day of August, A. D. 1881, and as commanded thereby I summoned the within-named Joseph W. Johnson, Lawson Sheldon, George W. Adams, Joseph M. Beardsley, Joseph H. McKinnon, and Benjamin G. Hoover on the 2nd and 3rd days of September, A. D. 1881, in Cass county, Nebraska, by delivering to each of them in person a true and certified copy of this writ and of all the endorsements thereon. R. W. Hyers, sheriff.

Fees	$3 25
Mileage	7 90
	$11 15

And now, September 12th, A. D. 1881, 10 o'clock a. m., comes the said Joseph W. Johnson, Lawson Sheldon, George W. Adams, and Benjamin G. Hoover, and the said Joseph H. McKinnon and Joseph M. Beardsley failed to appear, and thereupon Samuel Rector and C. H. Came were duly selected and summoned to act as commissioners in said cause, and thereupon all of said commissioners, resident freeholders, took and subscribed the following oath, to wit:

STATE OF NEBRASKA, } ss:
Cass County, }

We, Joseph W. Johnson, Lawson Sheldon, Samuel Rector, George W. Adams, Benjamin G. Hoover, and C. F. Came, do solemnly swear that we will support the Constitution of the United States and the constitution and laws of this State and faithfully and impartially perform the duties of commissioners to appraise the damages accruing to owners of land in Cass county, Nebraska, appropriated by the Missouri Pacific railroad of Nebraska; and we further swear that we are not interested in a like controversy in any manner whatever.

J. W. JOHNSON.
GEO. W. ADAMS.
C. F. CAME.
SAM'L RECTOR.
LAWSON SHELDON.
B. G. HOOVER.

23 Subscribed in my presence and sworn to before me this 12th day of September, A. D. 1881.

[SEAL] A. N. SULLIVAN,
County Judge.

December 1st, A. D. 1881.—The following proof of publication was this day filed by the said Missouri Pacific Railway Company of Nebraska, to wit:

Legal Notice.

The following persons, supposed to be owners of or claimants of interest in the respective tracts or parcels of land set opposite their names, and all other persons having or claiming any right or interest in or to any of the following-described tracts or parcels of land, are hereby notified that the route of the Missouri Pacific Railway Company of Nebraska has been duly located through said tracts or parcels of land lying and being in the county of Cass, State of Nebraska, described as follows, to wit:

Name.	Description.	Sec.	T'p.	R.
H. Lewis	S. W. qr.	23	11	12
N. Z. Harris N. C. Harris	E. ½ S. W. qr.	2	11	11
B. Talbot	W. ½ N. W. ¼	11	11	11
J. G. Long	S. E. ¼ S. E. ¼	10	11	11
H. A. Summer	N. E. ¼	15	11	11
S. T. Anderson	N. E. ¼ N. E. ¼	27	11	11
J. Morton	N. W. ¼ N. W. ¼	7	10	12
M. Canada S. M. Merriam J. W. Payne	S. E. ¼ N. W. ¼	18	10	12

J. Leavitte, estate P. N., lot 6, block 72, Weeping Water.
E. M. Balcom, lots 15, 16, block 72, Weeping Water.
Sam'l Clinton, mill reserve, Weeping Water.
D. H. Benjamin, estate, lots 365, 366, Louisville.

24 And each and all of said parties, owners or claimants of interest, are hereby notified to appear before the county judge of said county, at his office, in the county and State aforesaid, in said matter, according to law, on or before the thirteenth day of September, A. D. 1881.

Omaha, August 27, 1881.

THE MISSOURI PACIFIC RAILWAY
COMPANY OF NEBRASKA,
By F. P. IRELAND.

STATE OF NEBRASKA, } ss:
County of Cass, }

Z. C. Wentworth, being duly sworn, deposes and says that he is the foreman in the office — Cass County Recorder, a newspaper published at Weeping Water, in Cass county, Nebraska, and of general circulation within said county and State; that the notice hereto annexed was duly published in said newspaper on August 31, September 7, 14, 21, 28, A. D. 1881, according to law.

Z. C. WENTWORTH.

Subscribed in my presence and sworn to before me this 1st day of December, A. D. 1881.

E. L. REED,
Notary Public.

December 1st, 1881.—The commissioners aforesaid returned the following award, to wit:

Commissioners' Report.

STATE OF NEBRASKA, } ss:
County of Cass, }

To the county court of Cass county, State of Nebraska, and to the judge of said court:

We, the undersigned, residents and freeholders of Cass county, Nebraska, heretofore duly selected by said judge, and being summoned by the sheriff of said county and duly qualified to inspect the real estate in said county over and through which the Missouri Pacific Railway Company of Nebraska, a corporation in said State, desires to locate a railroad, and to assess the damages which the respective owners of real estate may sustain, and all persons having any interest or claim whatever in said real estate, by reason of the appropriation of their land, respectively, for that purpose in said county, respectfully report to your honor, the judge of the said county court, to wit:

Pursuant to notice, on the twenty-third day of November, 1881, we personally, in a body, actually viewed and inspected the following real estate through and over which land said railroad company has located its railroad bed: A strip of land embraced within fifty feet on either side of the center line of the road of said company through, over, and across that tract or parcel of land known as the Mill Reserve, situated in the town of Weeping Water, county of Cass, State of Nebraska, excepting, however, within said fifty feet so appropriated by said Missouri Pacific Railway Company of Nebraska, the mill-house proper, the mill dam or race, and its privileges, to the exclusive use and benefit of the owner or owners of said property, and we do assess the damages sustained by the owners of and parties claiming an interest in and to said land at $850.00 by

reason of the appropriation of said land to the use of said railroad corporation as now located and described.

JNO. W. JOHNSON.
GEO. W. ADAMS.
LAWSON SHELDON.
B. G. HOOVER.
C. F. CAME.
S. RECTOR.

January 28th, 1882.—Samuel Clinton filed notice of appeal from the foregoing award.

STATE OF NEBRASKA, } ss:
Cass County, }

I, J. W. Johnson, sole judge and *ex-officio* clerk of the
26 county court within and for the county aforesaid, do hereby certify the within and foregoing to be a true and accurate transcript of the proceedings had and done in said matter as the same appears of record in said county court, in the condemnation record, on pages 21, 27, 136, 161, 162, 163, 164, & 165; and I further certify that said Missouri Pacific Railway Company of Nebraska deposited in the county judge's office the said sum of $850.00, the damages reported by the commissioners as aforesaid.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said county court this 29th day of September, 1883.

[SEAL.] J. W. JOHNSON,
County Judge.

Endorsed: In the matter of the application of the Missouri Pacific Railway Company of Nebraska for the appointment of commissioners to assess damages. Transcript. Cass Co., Neb. Fees, transcript, $2.75. Rec'd payment of A. N. Sullivan, att'y. J. W. Johnson, Co. judge.

Upon the back of said motion for rehearing appear endorsements in words and figures following, to wit: No. 340, G. U. S. circuit court. S. Clinton *vs.* The M. P. R'y Co. Motion for a rehearing. Filed Jan. 2, 1884. Elmer D. Frank, clerk. J. M. Thurston, pl'ff's att'y.

Thereupon, afterwards, at the January term of said court, on the 11th day of February, 1884, the following proceedings were had and done, as appears of record on folio 242, Journal "I" of said court, to wit:

SAMUEL CLINTON
vs. } 340, G.
THE MISSOURI PACIFIC RAILWAY COMPANY.

This cause being argued and submitted to the court on the
27 motion of said plaintiff for a rehearing herein, the court does, on consideration thereof and being fully advised in the prem-

ises, now on this day order and adjudge that said motion be, and the same hereby is, overruled, and the order heretofore entered herein dismissing appeal is adjudged by the court to be final.

Thereupon, afterwards, to wit, on the 12th day of September, 1884, a writ of error was allowed and a citation issued in said case, of which the following are the original copies:

28 UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Samuel Clinton, plaintiff, and The Missouri Pacific Railway Company, defendant, a manifest error hath happened, to the great damage of the said plaintiff in the said cause, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States shall be done.

Witness the Honorable *Salmon P. Chase*, Chief Justice of the said Supreme Court of the United States, at Omaha, in said district, this 12th day of September, 1884.

[Seal United States Circuit Court, District of Nebraska.]

ELMER D. FRANK, *Clerk.*

Allowed by—
ELMER S. DUNDY, *Judge.*

[Endorsed:] No. 340, G. United States circuit court, district of Nebraska. Samuel Clinton, pl'ff in error, *vs.* The Missouri Pacific Railway Co., def't in error. Writ of error. Filed Sep. 12, 1884. Elmer D. Frank, clerk.

29 UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

To The Missouri Pacific Railway Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district

of Nebraska, wherein Samuel Clinton is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable *Salmon P. Chase*, Chief Justice of the Supreme Court of the United States, at Omaha, this 12th day of September, 1884.

[Seal United States Circuit Court, District of Nebraska.]

ELMER S. DUNDY, *Judge.*

Service of the above citation accepted this 17th day of September, 1884.

EVEREST & WAGGENER,
CHARLES OGDEN,
Att'ys for the said Missouri Pacific Railway Company.

[Endorsed:] No. 340, G. United States circuit court, district of Nebraska. Samuel Clinton, pl'ff in error, *vs.* The Missouri Pacific Railway Co., def't in error. Citation. Filed Sept. 17th, 1884. Elmer D. Frank, clerk.

30 UNITED STATES OF AMERICA, } *ss:*
District of Nebraska, }

By virtue of the foregoing writ of error and in obedience thereto, I, Elmer D. Frank, clerk of the circuit court of the United States for the district of Nebraska, in the eighth circuit, do hereby certify that the foregoing folios, from 1 to 28, contain true and faithful transcripts of all pleadings and proceedings of record and on file in my office as said clerk, in the case of Samuel Clinton *vs.* The Missouri Pacific Railway Company, and that a copy of the writ of error and citation has been lodged and remains in my said office.

Witness my hand and the seal of said court, at Omaha, this 17th day of September, 1884.

[Seal United States Circuit Court, District of Nebraska.]

ELMER D. FRANK, *Clerk.*

Endorsed on cover: Nebraska C. C. U. S. No. 311. Samuel Clinton, plaintiff in error, *vs.* The Missouri Pacific Railway Company. Filed 25th September, 1884.

122-469

FILED
APR 27 1887
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT

Of the United States.

SAMUEL CLINTON,
Plaintiff in Error,

vs.

THE MISSOURI PACIFIC RAILWAY CO.,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

J. M. THURSTON,
Of Counsel.

OMAHA:
THE REPUBLICAN PRINTING HOUSE.
1887.

IN THE

SUPREME COURT

Of the United States.

SAMUEL CLINTON,

Plaintiff in Error,

vs.

THE MISSOURI PACIFIC RAILWAY CO.,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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OMAHA:
THE REPUBLICAN PRINTING HOUSE.
1887.

In the Circuit Court of the United States.

SAMUEL CLINTON,
Plaintiff in Error.

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY,
Defendant in Error.

STATEMENT OF THE CASE AND BRIEF FOR PLAINTIFF IN ERROR.

This was a case removed into the Circuit Court of the District of Nebraska from the District Court of Cass County, Nebraska, and the cause of action consists of an appeal, by the plaintiff in error, from an assessment under condemnation proceedings had against his real estate, by the defendant in error, under the statutory authority contained in Section 97 of Chapter

2, entitled "Corporations," as found in the general statutes of Nebraska of 1873, which is as follows:

"Sec. 97. If the owner of any real-estate over which said railroad corporation may desire to locate their road, shall refuse to grant the right-of-way through his or her premises, the Probate Judge of the county in which said real-estate may be situated, as provided in this subdivision, shall upon the application of either party direct the sheriff of said county to summon six disinterested free-holders of said county, to be selected by said Probate Judge, and not interested in a like question, unless a smaller number is agreed upon by the parties, whose duty it shall be to inspect said real-estate and assess the damages which said owner will sustain by the appropriation of his land to the use of said railroad corporation *and make report in writing* to the Probate Judge of said county, who after certifying the same under his seal of office, shall transmit the same to the county clerk of said county for record and the said county clerk shall file, record and index the same in the same manner as is provided for the record of deeds in this state. And such record shall have the like force and effect as the record of deeds in pursuance of the statute in such case made and provided. And if said corporation shall, at any time before they enter upon said real-estate for the purpose of constructing said road, pay to said Probate Judge for the use of said owner, the sum so assessed and returned to him as aforesaid, they shall thereby be

authorized to construct and maintain their road over and across said premises; provided, that either party may have the right to appeal from such assessment of damages to the District Court of the county in which such lands are situated, *within sixty days after such assessment.* And in case of such appeal, the decision and finding of the District Court shall be transmitted by the clerk thereof, duly certified to the county clerk to be filed and recorded, as hereinbefore provided in his office. But such appeal shall not delay the prosecution of the work on said railroad if such corporation shall first pay or deposit with said Probate Judge the amount so assessed by said free-holders; and in no case shall said corporation be liable for the costs of such appeal, unless the owner of such real-estate shall be adjudged entitled, upon the appeal, to a greater amount of damages than was awarded by said free-holders. The company shall, in all cases, pay the costs of the first assessment; provided, that either party may appeal from the decision of the District Court to the Supreme Court, and the money so deposited shall remain in the hands of the Probate Judge until a final decision be had, subject to the order of the Supreme Court."

As shown by the record, the Missouri Pacific Railway company on the 5th day of July, 1881, applied to the County Court of Cass county, Nebraska, for the appointment of Commissioners to assess damages for its right-of-way through the county. The commissioners

were duly appointed, sworn, and appear to have organized on the 12th of September following. On the 1st of December, 1881, the commissioners returned their award and assessment to the judge of the County Court as appears by the record.

It may be well to note that by the constitution of 1875, the Court which was theretofore known as the Probate Court became the County Court and the Probate Judge, to whom by the statutes the return of the assessment was to be made, became County Judge and all proceedings thereafter proceeded in the name of the *County* Court and the *County* Judge.

It appears, by the return of the appraisers, that on the 23d day of November, 1881, they "personally, in body, actually viewed and inspected the real-estate" condemned, but there is no statement in their return showing when they agreed upon the amount of damages to be awarded, except as they say, "and we do assess the damages, etc."

It is fair to assume, I think, that this report presented to the County Judge for the first time on December 1st, had not been agreed upon until the date of its presentation. It will therefore be seen that the question, as to the time within which the appeal was taken, depends upon the decision as to whether the computation is to be made from the day on which the Commissioners met and viewed the land, or from the day on which they re-

turned their assessment *to* the County Judge. The appeal was taken and perfected on January 28, 1882.

There is no question made in the record as to the sufficiency of the steps taken to perfect the appeal. The Supreme Court of Nebraska having decided that it was only necessary to file the record in the District Court. No notice of any kind of such appeal being necessary.

No appeal bond, even, is necessary. 6. Neb. 160, 15. Neb. 234.

Among the grounds set forth in the motion to dismiss are several attacking the sufficiency and regularity of the proceedings leading up to the appointment of the commissioners, but this claim was not urged upon argument in the court below, and doubtless will not be in this court, as such proceedings were instigated upon the application of the defendent in error, and *it* certainly could not question the jurisdiction of the commissioners to assess the damages, when it has, by virtue of their assessment, actually entered upon and taken the land of the plaintiff in error for its right of way.

The court below sustained the motion to dismiss solely upon the ground that the appeal had not been taken within the statutory time of sixty days after the assessment; deciding that the time commenced to run from the day when the commissioners met and viewed the land and not from the date of the return of their as-

sessment. This is the only error relied upon by plaintiff in error.

It will be seen by the foregoing that the only real question in the case is this: From what time does the sixty days within which an appeal may be taken from the assessment of the appraisers commence to run?

Is it from the time when the appraisers actually meet to view the property sought to be condemned? or, is it from the time when their assessment is reduced to writing, agreed to by all, signed, returned to, and filed in the office of the Probate or County Judge of the county?

If such sixty days is to be computed from the day on which the appraisers meet to assess the property, then the appeal in this case was not taken in time and the action was rightfully dismissed. If, however, such sixty days is to be reckoned from the time when such appraisers completed their assessments of damages by making a report in writing to the Probate or County Judge, then the appeal was perfected within the statutory time, and the court below erred in sustaining the motion to dismiss, and in finally dismissing the case.

After a very diligent examination of all the authorities bearing upon condemnation matters, and other similar questions, I am unable to find a single adjudicated case, which seems to throw any light upon the

question of the construction of the provisions of the statute heretofore cited.

So far as it relates to the date from which the computation of time is to be made, it seems possible to treat this question only from the standpoint of a first construction of a statutory provision which has heretofore received no judicial interpretation.

The language giving the right of appeal says that the party may appeal "within sixty days after such assessment."

I submit that under no fair construction can it be held that there has been an assessment until the report has been agreed to, reduced to writing and returned to the Probate or County Judge as the statute provides.

The mere meeting of the appraisers upon the land in controversy, does not of itself, constitute an assessment. They may or may not receive evidence as to the value. They may or may not hear arguments of the parties interested. They may, immediately agree upon an assessment, or they may consistently take any reasonable time within which to come to an agreement. They constitute a jury for the purpose of determining an issue and returning a verdict.

It seems fair to say that their report or assessment may be likened to the verdict of a jury. They must all

agree to it. They may be of many minds upon first consultation. It may take hours, days, or weeks to harmonize their conflicting opinions and produce a unity of judgment. There is no decision by a jury, there is no verdict, until it is returned into court. Can there be an assessment, which must be in writing, until such assessment is actually reducted to writing, signed and returned into court?

In the trial of a case to a jury, a party, by the statutes of almost all of the states, has so many days after a verdict within which to file a motion for a new trial. Generally, a limited number of days. And if the time is to run from the date of the retirement of the jury the verdict may not be agreed upon, or known, until after the time allowed, whithin which a motion for a new trial may be made.

So in this case, the appraisers fix a time for meeting upon the property; they certify in their report that they met upon the property at a certain time, and they say, "We do assess the damages as follows." Their report, in which they use this language, "*do assess*," was presented and filed in the proper court many days after the date when they certify they met to assess the damages.

As in the case already suggested, they might prolong their deliberations for more than sixty days from

the time of their first assembly to assess the damages, and, if the rule of construction contended for upon the other side is to prevail, the Commissioners, by delaying action in agreeing upon or returning their assessment, could absolutely deprive a party of all right of appeal.

The appraisers are not bound by any aggreement to which they may arrive, until that agreement is made of record. They might meet upon the property at a certain time, agree upon an assessment, reduce it to writing and sign it. There would be nothing in this binding upon their action until their written report had been returned as provided by law.

On their way to the office of the Probate or County Judge they might, if they willed, destroy the report already agreed upon, change their minds as to value, make an entirely new and different report, and their action would be legal. The report as actually returned would stand as the assessment and not the one upon which they first agreed, but which they did not see fit to stand by and return as provided by law. The intention of the law is to give a party sixty days, no more and no less, within which time he is to determine as to whether or not he will appeal, and all of which time he is to have for the perfection of his appeal. Now, he cannot *know* what the assessment is from which he is to appeal until the report is made of record, until the finding is reduced to writting, and until it is returned, as provided

by law, into a public office where he may have an inspection of it.

If the appraisers, by withholding the report for one day, may deprive him of one-sixtieth part of his statutory time for appeal, by withholding it thirty days, they may deprive him of one-half, and by withholding it for sixty days they may deprive him of all.

He may rest satisfied in the belief that the appraisers will do him justice and agree upon a satisfactory amount of damages. He is bound to so believe until their report is made and he finds that the contrary is true. It is only when this report is returned and filed that he can question its justice, either as to the regularity of the proceedings leading up to it, or as to the amount assessed.

It therefore seems to me that the whole process of the argument upon this question, results in reasoning in a circle. A statement of the proposition is its own solution.

I need not urge here that no notice whatever of the day fixed for viewing the premises was ever given to the plaintiff in error; that fact cannot be taken advantage of by him in this proceeding. For the purposes of this case we cannot and do not attack the regularity of the proceedings leading up to the assessment, but we do submit that there is no assessment and can be no

assessment until there is an agreement as to the amount by all the appraisers, until that agreement is reduced to writing, constituting a report as designated by the statute, and returned into the office of the Probate or County Judge as therein required. All of this constitutes an assessment, less than this is nothing.

In the preparation of this brief I have not before me a copy of the record as filed in this Court, and am uncertain as to whether or not it shows that a general appearance had been entered by J. L. Webster, Esq., for the Missouri Pacific Railway Co., at least one or two terms prior to the filing of the motion to dismiss. Such, however, was the case, and I think that fact was made to appear in the record transmitted to this Court. If such is the record then the motion to dismiss came too late.

11 Neb. 304.

I submit, therefore, that the decision of the court below should be reversed and the case remanded for trial.

JOHN M. THURSTON,
Attorney for Plaintiff in Error.

122-469

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

SAMUEL CLINTON,
Plaintiff in Error,
against
THE MISSOURI PACIFIC RAILWAY COMPANY.

No. 311.

BRIEF FOR DEFENDANT IN ERROR

BY

JOHN F. DILLON.

BURGOYNE'S "Quick" Print, 146-150 Centre St., N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1886.

SAMUEL CLINTON, Plaintiff in Error, AGAINST THE MISSOURI PACIFIC RAILWAY COMPANY.	No. 311.

Brief for Defendant in Error.

BY JOHN F. DILLON.

Statement.

The writ of error brings up for review here an order made by the Circuit Court of the United States for the District of Nebraska, dismissing the appeal of the plaintiff in error from what purports to be an award of Commissioners in proceedings for condemnation of right of way.

The Nebraska Statute regulating condemnation proceedings (as far as in point here) is as follows (Gen. Stats. of Neb., 1873, Tit. Corporations, pp. 191, 192):

"SEC. 97. If the owner of any real estate over which said railroad corporation may desire to locate their

road shall refuse to grant the right of way through his or her premises *the Probate Judge of the county* in which said real estate may be situated, as provided in this subdivision, *shall, upon the application of either party, direct the Sheriff of said county* to summon six disinterested freeholders of said county, to be selected by said Probate Judge and not interested in a like question, unless a smaller number is agreed upon by the parties, whose duty it shall be to inspect said real estate and assess the damages which said owner will sustain by the appropriation of his land to the use of said railroad corporation, and make report in writing to the Probate Judge of said county, who, after certifying the same under his seal of office, shall transmit the same to the County Clerk of said county for record, and the said county clerk shall file, record and index the same in the same manner as is provided for the record of deeds in this State. And such record shall have the like force and effect as the record of deeds in pursuance of the statute in such case made and provided. And if said corporation shall, at any time before they enter on said real estate for the purpose of constructing said road, pay to said probate judge for the use of said owner, the sum so assessed and returned to him as aforesaid, they shall thereby be authorized to construct and maintain their railroad over and across said premises: *Provided, that either party may have the right to appeal from such assessment of damages to the district court of the county in which such lands are situated, within sixty days after such assessment.* And in case of such appeal, the decision and finding of the District Court shall be transmitted by the clerk thereof, duly certified, to the County Clerk, to be filed and recorded, as hereinbefore provided, in his office. But such appeal shall not delay the prosecution of the work on said railroad, if such corporation shall first pay or deposit with said probate Judge the amount so assessed by said freeholders; and in no case shall said corporation be liable for the costs on such appeal, unless the owner of such real estate be adjudged entitled, upon the appeal, to a greater amount of damages than was awarded by said freeholders. The company shall, in all cases, pay the costs of the first assessment: PROVIDED, That either party may appeal from the decision of the District Court to the Supreme Court of the State, and the money so de-

posited shall remain in the hands of the probate Judge until a final decision be had, subject to the order of the Supreme Court."

In the order dismissing the appeal (Record, p. II., fol. 18) it is stated that the Court "doth find that the said appeal was not taken within sixty days from the date of the assessment of damages made by said commissioners of the land in controversy, and the Court doth sustain said motion to dismiss such appeal."

It will be insisted in the argument that this finding is conculsive, and in this Court, there being no bill of exceptions, it cannot be controlled by other portions of the transcript in which it is stated that the report of the Commissioners was filed December 1st, 1881.

The papers printed in the record, if they can be considered on this writ of error, show that on July 5th, 1881, the County Court of Cass County made an order appointing certain commissioners to appraise and assess damages accruing to owners of land to be appropriated by the defendant company. On September 27, 1881, summons issued to the commissioners so appointed. On September 12, 1881, summons returned duly served (return not copied). The commissioners (including two who were substituted—by what authority it is not shown—in the place of two appointed by the Court, who failed to appear) took the oath prescribed by law. On December 1, 1881, these commissioners returned their award, and on January 20, 1882, the plaintiff filed notice of appeal from the award (Record, pp. 1–3).

The transcript of the record from the County Court to the District Court, upon appeal from the award, consisted of the foregoing, and of nothing more.

Vide Certificate of County Judge, Record, p. 3.

Except as to the order appointing the commissioners, their award of damages and the notice of appeal, the transcript consists of recitals of the substance or effect of the record in the County Court, and is not a copy or transcript of the record itself. This incomplete transcript appears to have been filed in the office of the Clerk of the District Court on the 28th of January, 1882.

On June 20, 1882, the plaintiff in error filed in the District Court his petition and bond for removal to the Federal Court, and the District Court made an order so removing the proceedings. A motion to remand was made, but not pressed.

On December 18, 1882, the defendant moved to dismiss the appeal and case, enumerating twelve grounds of motion. The motion was granted and an order—that now under review—was entered dismissing the appeal of the plaintiff in error. No exception was taken; no bill of exceptions was signed, and the motion and the ruling thereon, it is submitted, are not part of the record which can be considered by this Court.

The foregoing is a summary of the record in this Court in so far as it may in any view be properly here considered. The record also includes (improperly, as we submit) papers which we may suppose were introduced by the plaintiff upon his motion for a rehearing, but which are in no way identified as such. We will have occasion to advert to this in the following argument.

The plaintiff in error only relies upon one error, namely, that the appeal was improperly dismissed (see his Brief, pp. 7 and 8). The defendant in error insists that the record presents no error which can be re-

viewed, and for which the appeal can be reversed; and in support of this contention submits the following points:

ARGUMENT.

I. No adequate Assignment of Errors.

There is no assignment of errors such as is required by section 997 of the Revised Statutes and the fourth clause of General Rule 21 of this Court in such cases. As this is apparent by an examination of the record and the argument for the plaintiff in error, it need not be elaborated.

II. There is in the record neither any bill of exceptions nor any exception to the ruling of the Court which is here complained of.

The statute is express that "the right of appeal from such an assessment of damages to the District Court of the county in which such lands are situate must be taken within sixty days after such assessment." In the order dismissing the appeal it is stated that the "Court doth find that said appeal was not taken within sixty days from the date of the assessment of damages made by such commissioners of the land in controversy, and the Court doth sustain said motion to dismiss said appeal." If this be true, then obviously the appeal was properly dismissed. We insist that without a bill of exceptions making the motion to dismiss the appeal part of the record, the same cannot be considered, and

that there is nothing in the transcript or printed record which will authorize this Court to hold against the express finding of the Court below that the "appeal was not taken within sixty days from the assessment of damages," that such appeal was so taken. In short there must be a bill of exceptions making the motion part of the record, and in addition to this an exception to the ruling of the Court complained of. Neither of which appears.

III. The order dismissing the appeal (Record, p. 11) is not a final judgment to which a writ of error lies to this Court.

IV. No record was filed in Court below giving it Jurisdiction of Appeal from Assessment.

Since the decision of the Court below, now under review, the Supreme Court of Nebraska, in a case not referred to by the plaintiff in error, namely, the case of Gifford vs. Republican, &c., R. R., reported in 20th Nebraska Reports, holds that an appeal may be taken in such cases within sixty days from the time when the Commissioners' report was filed. If this Court shall rule Points I., II. and III. against the defendant in error, and shall hold that it appears from the record here so that it can be noticed by this Court that the report or award of the Commissioners was not filed until December 1st, 1881, even then we insist that the order dismissing the appeal was correct and ought not to be reversed. The case of Gifford vs. Re-

publican R. R. Co., is not referred to by the plaintiff in error, but it seems to be the part of frankness on our part to call it to the attention of this Court.

But upon the authority of that case, however, as well as upon principle, we further submit that the order of the Court below must be affirmed for other jurisdictional defects specified in the defendant's motion.

The statute referred to does not prescribe the method of perfecting an appeal from the award of commissioners. The method of perfecting such an appeal so as to invest the appellate Court with jurisdiction of the proceedings must, therefore, be determined by settled and sanctioned practice, and by the legal necessities of such a proceeding. It is obvious that the appellate Court must have before it a record, complete for all jurisdictional purposes, of the matters which it is called upon to review. In the present case such a record could not consist of anything less than a transcript from the County Judge of the entire condemnation proceedings, beginning with the petition of the defendant company for the appointment of commissioners (the jurisdictional basis of the entire proceeding) and concluding with the award of the commissioners. It would be obvious that the jurisdiction to review could not rest on anything short of this, even had such requirements never been judicially expressed. But the Supreme Court of Nebraska, in a construction of this statute which will be controlling here, has said :

"As to how such appeal shall be made or taken ; what papers filed or oaths taken, or whether any, the statute is wholly silent. And yet it will not be denied but something must be done *to bring the case within the*

jurisdiction of the District Court. Nor will it be denied that whatever must be done to give the appellate Court jurisdiction, *must be done within sixty days after such assessment.* * * *

In the case at bar the plaintiff served a notice upon the County Judge that he appealed to the District Court from the finding and award of the Commissioners, etc. This notice was served within sixty days from the assessment of damages. He also served a like notice, addressed to the defendant company, upon a person who had acted as right of way agent or assistant right of way agent of the defendant company, in and about the said condemnation proceedings. This notice was also served as aforesaid within sixty days from the assessment of damages. Whether this person was such an agent of the defendant company upon whom service of process or of notice in a proper case could be made as upon said corporation, is a question raised and discussed in the briefs, but which, with my views of the controlling question involved in the case, it is deemed unnecessary to decide.

The plaintiff also, within sixty days from the assessment of damages, filed in the District Court a petition against the said railroad company, based upon his claim for damages for such right of way greater than those awarded by said commissioners.

Were either or all of these proceedings sufficient to constitute an appeal and to give the District Court jurisdiction of the case? So far as notice is concerned, I remember no case, nor are we cited to any, where notice to the opposite party has been held to be a jurisdictional matter in the case of appeal under any statute. It has often been held to be the right of an appellee to have notice before the appellant would be permitted to proceed with the case, but not as a matter of jurisdiction. * * *

The general understanding of the profession in this state has been, as I believe, that *the essentially requisite proceeding to perfect an appeal from the award of commissioners, in a case of this kind, and to give the District Court jurisdiction of the same, is to file in the said Court, or in the office of the clerk thereof, a certified transcript from the County Judge, of the condemnation proceedings, from the original application to said County Judge for the appointment of commissioners to the report of such commissioners in the respective case, both inclusive.* * * *

I come to the conclusion, therefore, that the *essential act* by which an appeal, in cases of this kind may be taken, and the right preserved is *the filing of a transcript in the District Court.* And that not having been done in this case within the time limited by statute, nor sufficient cause shown for such failure without laches on the part of the appellant, the appeal was rightly dismissed."

Gifford vs. The Republican Valley and Kansas R. R. Co., 20 Neb., 538. Opinion, per. COBB, J.

The record transmitted to the District Court of Cass County, and thence to the Circuit Court below, was thus fatally defective because (and for other reasons) it did not contain a copy of any petition of the Railway Company for the appointment of commissioners. The jurisdiction of the appellate Court was derivative and could not exist upon a record which failed to disclose the original jurisdiction.

The plaintiff in error filed a motion for a rehearing of the motion to dismiss his appeal, and in support of his application he filed what he denominated "a full and complete transcript of the proceedings had in condemnation herein."

This "transcript" was certified to be such by the County Judge of Cass County on the *29th of September, 1883*—nearly two years after the assessment and appeal.

This last "transcript" cannot be here considered, because,

1st. The motion for a rehearing and all proceedings connected with it are proceedings not properly part of the record in this Court.

Lessee of Reed vs. Marsh, 13 Pet., 23; opinion by CHIEF JUSTICE TANEY.

2d. This "transcript" was never filed in the District Court of Cass County, and could in no event be considered unless there filed within sixty days after the assessment.

Gifford vs. Repub. Val. R. R. (*supra*).

The only purpose which this tardy "transcript" serves is to point out and emphasize the fatal defects of the original transcript. A comparison of the two makes more conspicuous the omission to include the following essential matters in the actual transcript :

The petition of the Railway Company for the appointment of assessors.

The summons of the County Judge to the Commissioners.

The Sheriff's return.

The oath of the Commissioners.

Notice to land owners and proof of publication.

The record, therefore, failed to show any jurisdiction in the County Court transmissable on appeal to the District Court of Cass County or thence to the Federal Court ; or any authority in the Commissioners to make the award from which the appeal is taken.

The unauthorized certificate of the County Judge to a summary of the proceedings cannot be substituted for the actual record of the proceedings, and such certificate cannot be here considered as part of this record.

Fisher vs. Cockerell, 5 Pet., 254 ; opinion by CHIEF-JUSTICE MARSHALL.

The order appealed from should therefore, as we submit, be affirmed.

JOHN F. DILLON,
Attorney for Defendant in Error.

May 10, '87.—50.